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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY  
CC Docket No. 96-152

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## SUMMARY

The Commission has jurisdiction over intrastate interLATA information services, including electronic publishing, telemessaging and alarm services, and can preempt state regulations inconsistent with its requirements that implement Sections 274, 260 and 275 of the Communications Act. A BOC may provide electronic publishing service only through a separate affiliate or joint venture "operated independently," meaning, inter alia, that the BOC and its affiliate cannot jointly own any transmission or other facilities or property. Neither the BOC nor the RBOC holding company should be permitted to cosign any financial instrument or otherwise incur any debt on behalf of its electronic publishing affiliate. Moreover, the BOC should not be permitted to share any officers, directors, and employees with its electronic publishing separate affiliate or joint venture.

If the Commission permits a BOC to provide electronic publishing through the same separate affiliate that provides interLATA telecommunications services, the BOC should be required to comply with the requirements of both Sections 274 and 272 of the Act with regard to that affiliate. Although the Computer III and ONA nondiscrimination requirements are inadequate, the Commission should at least apply those minimal protections to the BOCs' provision of electronic publishing, alarm monitoring, and telemessaging services. Finally, in enforcing the requirements of Sections 274, 275 and 260 of the Act, the Commission should

provide that, in a complaint action, the complainant must allege, with evidence sufficient to satisfy Section 1.720 of the Commission's Rules, a prima facie case that a violation of the statute has occurred. The burden of proof should then shift to the defendant, since it would be in possession of more probative information regarding its relative treatment of its affiliate and other entities and its compliance with the Act.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-152
Telecommunications Act of 1996:	)	
	)	
Telemessaging,	)	
Electronic Publishing, and	)	
Alarm Monitoring Services	)	

**COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION**

MCI Telecommunications Corporation (MCI) hereby responds to the Notice of Proposed Rulemaking (NPRM), FCC 96-310 (rel. July 18, 1996), initiating the above-captioned proceeding. In this proceeding, the Commission seeks to clarify and implement the non-accounting separate affiliate and nondiscrimination safeguards established in the Telecommunications Act of 1996 relating to the Bell Operating Company (BOC) and incumbent local exchange carrier (ILEC) provision of electronic publishing, alarm monitoring and telemessaging services.

As the Commission recognizes, the BOCs' entry into the foregoing in-region interLATA information services "raises serious concerns for competition and consumers," given their monopoly status in local exchange and exchange access services. NPRM at ¶ 7. The BOCs can use their advantage to improperly misallocate costs and cross-subsidize those competitive ventures and discriminate against rivals in providing them essential exchange access services and facilities. Id. Accordingly, the Commission is proposing herein to implement the separate

affiliate and nondiscrimination safeguards set forth in Sections 274, 275 and 260 of the Act, to ensure that the BOCs do not engage in those anticompetitive practices in providing electronic publishing, alarm monitoring and telemessaging services. MCI supports the thrust of the Commission's proposals, which parallel in many respects the proposals it is considering in the BOC In-Region NPRM proceeding.<sup>1</sup> MCI respectfully refers the Commission to its Comments and Reply Comments submitted in that proceeding for additional background on the views presented herein.<sup>2</sup>

I.    SCOPE OF THE COMMISSION'S AUTHORITY (¶¶ 19-27).

Sections 274, 275 and 260 of the 1996 Act establish the framework within which BOCs may provide electronic publishing, alarm monitoring and telemessaging services. A BOC may provide electronic publishing by means of its basic telephone service only through a separate affiliate or electronic publishing venture that meets the separation and nondiscrimination requirements of Section 274. Sections 275 and 260 address the ability of BOCs and ILECs to provide alarm monitoring services

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1.    Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996).

2.    Comments of MCI Telecommunications Corporation and Reply Comments of MCI Telecommunications Corporation, filed in the BOC In-Region proceeding on August 15 and 30, 1996, respectively.

and telemessaging services on an integrated basis provided they comply with nondiscrimination safeguards. NPRM at ¶¶ 10-12.

The Commission notes that its BOC In-Region NPRM tentatively concluded that telemessaging is an information service that, when the BOCs provide it on an interLATA basis, is subject to the requirements of Sections 260 and 272. Id. at ¶ 19. The Commission thus inquires whether, in light of its tentative conclusion in the BOC In-Region NPRM that Sections 271 and 272 give it jurisdiction over intrastate interLATA information services including telemessaging, Section 260 similarly gives the Commission jurisdiction over intrastate interLATA telemessaging services. Id. at ¶ 20. The short answer is that Section 260 clearly does give the Commission such jurisdiction, in light of the parallel purposes of Section 260 and Sections 271 and 272. Moreover, the Commission has the authority to preempt state regulatory requirements relating to the BOCs' provision of telemessaging, electronic publishing and alarm monitoring services that are inconsistent with its policies and rules concerning the BOCs' provision of those services.<sup>3</sup>

## II. BOC PROVISION OF ELECTRONIC PUBLISHING (¶¶ 28-67)

MCI supports the Commission's conclusion that a BOC may provide electronic publishing services only through a separate

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3. NPRM at ¶¶ 21, 25, 27. See Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355 (1986).

affiliate or an electronic publishing joint venture. NPRM at ¶ 32. Moreover, a reasonable reading of Section 274 requires the conclusion that Congress did not intend for the phrase "operated independently" in Section 274(b) to have a different meaning for separated affiliates and for electronic publishing joint ventures. Id. at ¶ 35.

Section 274(b)(2). This section provides that a separated affiliate or electronic publishing joint venture may not incur debt in a manner that would allow a creditor to seek recourse to the assets of the BOC. The Commission tentatively concludes that a BOC may not cosign a contract or other instrument with a separated affiliate or joint venture that would permit a violation of Section 274(b)(2). Id. at ¶¶ 36-38. MCI supports this conclusion, and to ensure compliance with Section 274(b)(2) the Commission should further provide that a RBOC holding company similarly may not enter into those impermissible credit arrangements.

Section 274(b)(5). The Commission tentatively concludes that this provision precludes a BOC from sharing officers, directors, and employees in common with a separated affiliate, but that no such limitation applies to the BOC's electronic publishing joint venture. Id. at ¶ 39. MCI submits that the Commission's interpretation of the statute is unduly narrow and would enable the BOCs to circumvent the fundamental purpose of Section 274. Thus, the prohibition on the sharing of officers,

directors and employees must apply equally to both the separated affiliate and any electronic publishing joint venture.

The Commission also seeks comments on the degree of separation between a BOC and a separated affiliate required by Section 274(b)(5)(A) in light of Section 274(c)(2)(A), which allows for joint telemarketing activities. To the extent such activities are permitted by Section 274, in light of the arm's length relationship between the BOC and the separate subsidiary or electronic publishing joint venture required by Section 274, the BOC should be allowed to provide telemarketing services only pursuant to nondiscriminatory, publicly disclosed contracts. Moreover, Section 274(c)(2) requires that the BOC provide such services to unaffiliated parties on nondiscriminatory terms.

Section 274(b)(5) also prohibits the common ownership of property. To satisfy this requirement, it is clear that the affiliate, or joint venture, and the BOC's local exchange operations cannot jointly own any transmission or switching facilities or other property. The joint use of such facilities would invite the improper misallocation of costs that the separate affiliate requirement is designed to prevent. See id. at ¶ 41.

Comparison to Separate Affiliate Requirement of Section 272 (¶¶ 47-48). The Commission seeks comment on whether a BOC may provide electronic publishing through the same separate affiliate through which it provides its interLATA telecommunications

services, information services and manufacturing activities. The Commission also inquires whether, if a BOC elects to provide any or all of its Section 272 services and its Section 274 electronic publishing services through the same separate affiliate, whether it should be required to comply with Section 272, Section 274, or both, with regard to that affiliate. Clearly, a BOC must comply with all of the statutory requirements applicable to the activities of any affiliate. Thus, if the same affiliate provides both electronic publishing and other interLATA services, that affiliate must comply with both Sections 272 and 274.

Nondiscrimination Safeguards (§§ 64-67). The Commission seeks comments on whether, and to what extent, it should adopt regulations to implement the nondiscrimination safeguards for electronic publishing in Section 274(d), and whether the Computer III<sup>4</sup> comparably efficient interconnection (CEI) and open network architecture (ONA) requirements are consistent with that provision. Those latter requirements, although inadequate to prevent discrimination,<sup>5</sup> are not inconsistent with Section 274(d)

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4. Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958, 1039-42 (1986) (Computer III Order), on reconsideration, 2 FCC Rcd 3035 (1987); Phase II, 2 FCC Rcd 3072 (1987) (collectively, Computer III Orders), vacated and remanded sub nom., California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

5. See California v. FCC, 39 F.3d 919, 930 (9th Cir. 1994) (vacating Commission's decision to eliminate its previous separate affiliate requirement because "the FCC has ... failed to provide support or explanation for some of its material conclusions regarding prevention of access discrimination.").

and are the very least nondiscrimination protections that should be applied to the BOCs' provision of electronic publishing services. Those requirements provide for nondiscriminatory access to unbundled network services; the same quality of service installation and maintenance as are enjoyed by the BOCs' own information services operations; notification of changes in the network; and reporting on the quality and timeliness of installation and maintenance. In addition, in providing services to competitors, the BOCs should afford them functional equality or service of equal quality relative to the services the BOCs provide their affiliates.<sup>6</sup>

### III. TELEMESSAGING AND ALARM MONITORING SERVICES (§§ 68-77).

The Commission notes that its BOC In-Region NPRM tentatively concluded that telemessaging is an information service subject to the separate affiliate and nondiscrimination requirements of Section 272 and that the BOCs' provision of telemessaging service on an interLATA basis would be subject to the requirements of both Sections 272 and 260. Id. at ¶ 75. MCI supported that conclusion and does so here. In the instant NPRM, the Commission also concludes that the Computer III and ONA

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6. See MCI Comments at 31-33, BOC In-Region proceeding. As MCI also explained in those comments, the Computer III CEI/ONA rules are woefully inadequate. If those rules are strengthened in the Computer III Further Remand Proceedings, CC Docket No. 95-20, the strengthened rules should be applied to electronic publishing as well. See MCI Comments at 18-20, 32-33, 37-40, BOC In-Region proceeding.

requirements should continue to apply to the BOCs in their provision of alarm monitoring services and telemessaging services to the extent they are not inconsistent with Sections 260 and 275(b)(1), respectively. *Id.* at ¶¶ 74, 77. Those requirements, as described above, although inadequate to prevent discrimination, are not inconsistent with Sections 260 and 275(b)(1) and are the very least that should be done to protect against access discrimination in this case.

IV. ENFORCEMENT ISSUES (¶¶ 78-84).

The Commission seeks comment on the evidentiary standards that must be met to establish that a BOC has violated Sections 274, 260 or 275. In order to establish a prima facie case, a complainant should be required to allege, in the manner required by Section 1.720 of the Commission's Rules, that the BOC defendant is providing facilities to the complainant on less favorable terms relative to the terms it provides such facilities to its electronic publishing, telemessaging, or alarm services affiliate. A complainant could also establish a prima facie case by alleging that the BOC has failed to provide the complainant equivalent functionality relative to the functionality provided to the BOC's affiliate, irrespective of whether the BOC is providing the complainant the exact same service or facilities.

Once a prima facie violation of Sections 274, 260 or 275 has been established, the burden of proof should shift to the BOC,

given its control of the relevant information and the expedited procedures under which complaints must be adjudicated. See Sections 275(c) and 260(b). The defendant BOC would then have to demonstrate that there is no functional or qualitative difference between the facilities and services provided to the complainant and to the defendant's affiliate. The BOC would have, of course, better access to the relevant information concerning the facilities it provides to both entities and thus should be in a superior position to prove that no violation of the Act had occurred. Moreover, a defendant BOC has the relevant cost information to establish that the network access and interconnections for basic telephone service are provided to electronic publishers at just and reasonable rates. See Section 274(d).

Shifting the burden of proof to the BOC would clearly promote the pro-competition goals of the 1996 Act. NPRM at ¶¶ 79, 82. Knowing it must demonstrate that it has provided services and facilities to competitors on just and nondiscriminatory terms should provide an incentive to the BOC to treat competitors in a lawful manner, because its failure to meet that burden would result in a finding of liability and sanctions. If the complainant instead had the burden of proof, the BOC would not have an equivalent incentive. The complainant would have more difficulty establishing a violation in that case, since it would

lack complete information about the BOC's relative treatment of its affiliate and other entities.

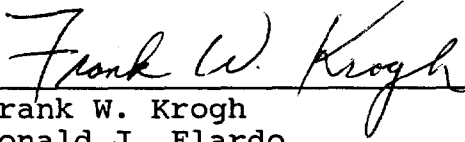
CONCLUSION

For the reasons stated above, the Commission should adopt the recommendations presented herein.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

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